Supreme Court, U.S.
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No._____

IN THE SUPREME COURT OF
THE UNITED STATES

CELESTER EDWARDS,
Petitioner,

v.

THE STATE OF ALABAMA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE ALABAMA COURT OF CRIMINAL APPEALS

PETITION FOR A WRIT OF CERTIORARI

JOE M. REED*
524 S. UNION STREET
MONTGOMERY, AL
36104
(334) 834-2000
(334) 834-2088 FAX
joemreed@bellsouth.net

*Counsel for Petitioner

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QUESTIONS PRESENTED

1. Whether uncorroborated allegations or statements of an informant, whose credibility and reliability have not been established or otherwise demonstrated to the magistrate, who fails to articulate his basis of knowledge and the time frame of the commission of the illegal conduct he alleges, should be considered as part of the totality of the circumstances in determining whether there is sufficient probable cause to issue a search warrant?

2. Whether narcotics residue found in a trash bag residing in the curtilage area in front of a residence, standing alone, can provide sufficient probable cause for the issuance of a search warrant for the same residence, when no independent police investigation has established a nexus between the contraband found in the trash bag and the residence to be searched or the individual to be seized?

3. May an officer-affiant rely on the 'Good Faith' exception to the warrant requirement when the officer himself creates and submits a bare-bones affidavit in support of the search warrant he seeks?

LIST OF PARTIES

1. Petitioner/Appellant: Celester Edwards(incarcerated), defendant represented by counsel, Joe M. Reed 524 S. Union Street, Montgomery, AL 36104

2. Respondent/Appellee: The State of Alabama, the Honorable Troy King, Attorney General for the State, 500 Dexter Ave. Montgomery, Alabama, 36130.

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OPINIONS BELOW

The Alabama Court of Criminal Appeals issued its opinion in this case on March 12th, 2010. Presiding Judge A. Kelli Wise wrote the court's opinion. A copy of that opinion is attached as Appendix A. On April 2, 2010, the Court of Criminal Appeals issued an order denying a rehearing. A copy is attached as Appendix B. The Alabama Supreme Court issued a one page order denying review of the Court of Criminal Appeals decision on June 18th, 2010. A copy of that order is attached as Appendix C.

JURISDICTION

On March 12, 2010, the Alabama Court of Criminal Appeals affirmed Edwards' conviction by memorandum opinion.

On March 26, 2010, Edwards filed an application for rehearing and brief in support with the Alabama Court of Criminal Appeals.

On April 2, 2010, the Alabama Court of Criminal Appeals denied Edwards Application for Rehearing.

On April 16, 2010, Edwards filed a petition for a writ of certiorari to the Alabama Court of Criminal Appeals with the Alabama Supreme Court under case number SC#1090999.

On June 18, 2010, the Alabama Supreme Court denied Edwards' petition.

The Supreme Court of the United States has jurisdiction to hear this matter pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States Constitution, which is applied to state governments through the Fourteenth Amendment, states in pertinent part: "No warrants shall issue, but upon probable cause, supported by oath or affirmation..."

STATEMENT OF THE CASE AND FACTS

On or about November 19, 2004, David W. Smith of the Daphne, Alabama Police Department presented Judge J. Langford Floyd of Baldwin County, Alabama with an affidavit in support of a search warrant for 407 Pine Street, Daphne, Alabama. The affidavit stated the following:

> My name is David W. Smith. I have been a police officer with the Daphne Police Department since March 2001. I have completed my minimum standards training at the Southwest Alabama police academy and have attended several narcotics training seminar/classes since. As a police officer I have made several felony and misdemeanor drug arrest and have testified in both municipal and circuit court, resulting in the conviction of those arrested. I have been assigned to the Baldwin County narcotics tasks force since November of 2004.
>
> On or around April of 2004 Cpl. Con Gibney with the Daphne police department received information from a female that Celester Edwards was selling cocaine out of his house and that he was selling ounces of cocaine for one thousand dollars a piece. Intel was gathered on Celester Cedric Edwards showing extensive history of drug arrest to include several possession of maijuana 1st charges. I have also spoken to a cooperating individual who has given drug information to the

narcotics task force in the past which has led to arrest, who said he has bought marijuana from Celester Edwards in the past and states that Edwards sells marijuana and cocaine to several subjects out of his house, located at 407 Pine St. Daphne, Al 36526. This subject stated that if someone in the Daphmont area needs powder cocaine then they go to Celester Edwards.

On November 16, 2004 I viewed garbage in front of 407 Pine St. which was later taken control of in front of the residence believed to be that of Celester Edwards. This was in reference to a trash pull that was performed by investigator Ceonia Stanton on 10/22/2004 on this same residence being 407 Pine st. Daphne, Al. in that trash pull investigator Stanton recovered marijuana residue and baggies with cocaine residue in the trash along with u.s. mail addressed to 407 Pine St. and having Celester Edwards name on it. at the time of that trash pull investigator Stanton was a member of the Baldwin county narcotics task force. The garbage I had pulled on 11/16/2004 had been placed along the roadway for pick-up and was picked up by a solid waste supervisor with the city of Daphne in front of 407 Pine St. Daphne, Al. This supervisor then met me at the fire station in Daphne where control of the trash was handed over to myself for examination. While searching this garbage I found marijuana and marijuana residue (seeds and stems) which

field tested positive for marijuana. In this garbage was also found u.s. mail addressed to 407 Pine st Daphne, Al 36526. Two vehicles that are registered to Celester Edwards have been viewed by myself as being present at this residence on a frequent basis. Also Celester Edward's driver's license shows his address as being 407 Pine St. Daphne, Al 36526.

Based on my training and experience I know the following:
A: Drug dealers often keep the bulk of their supply at their residence to avoid the risk of seizure by transporting the bulk of their supply with them.
B. Drug dealers often keep records of the drug transaction to include but not limited to named, tally sheets and phone numbers in their residence.
C. Drug paraphernalia is often kept at in a drug dealers residence that is related to the use and sale of illegal drugs to include scales, baggies, pipes and cutting agents.
D. Drug dealers operate a cash business therefor currency is often found in their residences that is proceeds of the sale of illegal drugs.
E. Drug dealers often conceal drugs and/or currency outside of their residence in vehicles and/or buildings to keep from being found.
F. Drug dealers often keep photos and/or videos of themselves with quantities fo illegal drugs.

G. Based on the above stated facts, I have reason to believe that at the residence of Celester Edwards, there is marijuana, cocaine paraphernalia, documents, notes, currency, scales, packaging materials, photos, videos and other articles believed to be used in the unlawful possosseion or distribution of controlled substance and/or marijuana.

No additional information outside of the four corners of the affidavit was presented to Judge Floyd in support of the warrant.

On November 19, 2004, Judge J. Langford Floyd issued a search warrant based solely upon information contained the affidavit in support of the warrant. The warrant was executed on the same day at 407 Pine Street and the search revealed drugs and cash. Celester Cedric Edwards (Edwards) was arrested and charged with drug trafficking, a violation of Ala. Code 1975 §13A-12-231(2), possession of marijuana 1st degree, a violation of Ala. Code 1975 §13A-12-213, and tampering with physical evidence a violation of Ala. Code 1975 §13A-10-129.

On November 15, 2005, Edwards was indicted for trafficking in cocaine, §13A-12-231(2), possession of marijuana 1st degree, §13A-12-213, and tampering with physical evidence, §13A-10-129.

On September 15, 2006, Edwards filed a motion to suppress the evidence gathered as a result of the search warrant averring his Fourth

Amendment right to be free from unreasonable searches and seizures had been violated. C-93

On December 20, 2006, a hearing was held on Edwards' motion to suppress before the Honorable Judge J. Langford Floyd. C-127

On January 9, 2007, the Honorable Judge J. Langford Floyd denied Edwards' motion to suppress. C-5

On May 5, 2009, a trial was held in the mater and Edwards was found guilty of drug trafficking, possession of marijuana first degree, and tampering with evidence.

On June 11, 2009, Edwards was sentenced to Life in Prison in the Alabama Department of Corrections for trafficking in cocaine and fined $50,000.00; one year in the Baldwin County Alabama Jail for Possession of Marijuana in the first degree and fined $250.00, and 90 days in the Baldwin County Alabama jail and fined $100.00 for tampering with evidence.

On June 13, 2009, Edwards moved the court for a new trial.

On June 13 and June 25, 2009, Edwards filed a notice of appeal to the Alabama Court of Criminal Appeals averring that his Fourth Amendment right to be free from unreasonable searches and seizures had been violated .

On March 12, 2010, the Alabama Court of Criminal Appeals affirmed Edwards' conviction by memorandum opinion.

On March 26, 2010, Edwards filed an application for rehearing and brief in support with the Alabama Court of Criminal Appeals.

On April 2, 2010, the Alabama Court of Criminal Appeals denied Edwards Application for Rehearing.

On April 16, 2010, Edwards filed a petition for a writ of certiorari to the Alabama Court of Criminal Appeals with the Alabama Supreme Court under case number SC#1090999.

On June 18, 2010, the Alabama Supreme Court denied Edwards' petition.

Reasons for Granting the Writ

Pursuant to Supreme Court Rule 10(c), the Court should clarify for The Alabama Court of Criminal Appeals how the Court's application of the totality of the circumstances test, as announced in *Illinois v. Gates*, 462 U.S. 213 (1983), while considering the factors of the reliability or credibility of an informant and his basis of knowledge of alleged illegal activity as announced in *Aguilar v. Texas*, 378 U.S. 108 (1964) and *Spinelli v. United States*, 393 U.S. 410 (1969) , and how the sufficiency of stand-alone evidence of contraband obtained from a "trash pull" should be viewed in determining probable cause to issue a warrant.

I. The matter before the Court is one of first impression.

In 1988, the Court in *California v. Greenwood*, 486 U.S. 35, decided the issue of whether or not a person maintained a privacy interest in trash placed on the curb for pickup. This Court decided that case in the negative. Never in the history of the Court, however, has it decided the question of whether the discovery of an unknown amount of illegal drug residue found in a trash bag sitting on the curb outside of a residence, standing alone, generates sufficient probable cause to believe in the continuing presence of contraband in the same residence, and thereby justifying the issuance of a search warrant.

II. The decision of the Alabama Court of Criminal Appeals, that the information supplied by informants contained in the affidavit in support of the warrant was sufficient to find probable cause, conflicts with established precedents of the Court and other federal circuits.

The Alabama Court of Criminal Appeals erred in its decision to permit testimony of informants, whose reliability or credibility and basis of knowledge was not demonstrated to the magistrate, to be lawfully considered as part of the "totality of the circumstances" in evaluating an affidavit seeking a search warrant. This holding is in direct conflict with the Court's holding in *Aguilar, Spinelli,* and *Gates.* The Alabama Court of Criminal Appeals also erred when it concluded that a bare-bones affidavit in support of a warrant satisfied the 'Good Faith' exception, as enumerated in *United States v. Leon,* 468 U.S. 897 (1984), when the affiant seeking the exception created the bare-bones affidavit.

III. There is a Split within the Federal Circuits and among State Appellate Courts regarding what information in an affidavit in support of a warrant a magistrate may consider within the bounds of the "totality of the circumstances" to determine whether or not probable cause exists to issue a warrant.

State and federal courts are in conflict regarding the implementation of *Gates*, with respect to not only uncorroborated allegations of informants whose credibility and basis of knowledge are not presented for the magistrate's consideration, but additionally the sufficiency of narcotic residue recovered in a "trash pull," standing alone, in a magistrate's determination of probable cause under a "totality of circumstances analysis." The issue of whether the contraband recovered from a garbage bag, standing alone and without any independent police corroboration, would render the continued presence of cocaine or marijuana in a defendant's home-three days later- probable, has not been addressed by the Court. Should a magistrate consider evidence, which standing alone, has already been determined to be insufficient probable cause for the issuance of a warrant? Edwards' case presents an appropriate set of facts for addressing this issue.

ARGUMENT

I. **The question of whether or not the discovery of an unknown amount of drug residue found in a trash bag sitting on the curb for pickup, in front of a residence for an unknown amount of time and exposed to the general public, standing alone, is sufficient to establish a determination of the continuing presence of contraband within a residence, is one of first impression in this Court.**

In 1988, the Court in *California v. Greenwood*, 486 U.S. 35, decided the issue of whether the Fourth Amendment prohibited the search and seizure of garbage left for collection outside the curtilege of a home. The Court held that an individual who placed his trash outside on the curtilage of his home for pickup did not maintain a reasonable expectation of privacy in the trash bags, and therefore, had no Fourth Amendment protection in those bags. *Id.* at 40-41.

In determining that there was no reasonable expectation of privacy in a trash bag left on the curtilage for pickup, the Court stated that
It is common knowledge that plastic garbage bags left on or at the side of a public street are readily accessible to animal, children, scavengers, snoops, and other members of the public...Moreover, respondents placed their refuse at the curb for the express purpose of conveying it to a third party, the trash collector, who might himself has sorted through respondents trash or permitted others, such as the police, to do so. Accordingly, having deposited

their garbage "in an area particularly suited for public inspection and, in a manner of speaking, public consumption, for the express purpose of having stranger take it," *United States v. Reicherter*, 647 F.2d 397, 399(3d.Cir. 1981), respondents could have had no reasonable expectation of privacy in the inculpatory items that they discarded. *Id* at 40-41

Here, Edwards does not argue the privacy issue of a trash bag that was decided in *Greenwood*, but instead argues the heightened privacy one has in the sanctity of his home and the issue of first impression before this Court, which is, whether or not the fruits of the search of garbage, i.e. contraband, found in a trash bag sitting on the curtilage of his home for an unknown length of time, "readily accessible to animals, children, scavengers, snoops, and other members of the public", and without there being any connection that contraband found in the trash came from Edwards' home, is sufficient to believe that his home continued to harbor narcotics. *See Greenwood* 486 U.S. at 40-41. What is at stake in this petition is the level of privacy one may maintain in their home. To sanction a search of a home under these circumstances is to seriously and detrimentally eliminate the protections a home is afforded under the Fourth Amendment. An unscrupulous officer seeking entry into a home could merely deposit narcotics in the trash can at a house at an undetermined day and time, subsequently discover such refuse, present that information to a magistrate, and successfully gain access to the private matters in the house. Furthermore, a

frustrated neighbor or associate could drive by and place narcotics in a trash bag on the curb, call the police, notify them of such contents, and after a search of the trash bag and seizure of the contraband, a series of embarrassing and threatening chain of events would unfold, culminating in the search of the home and possible criminal charges. If the Court permitted the mere discovery of contraband in a trash bag, standing alone, to indicate the continuing presence of drugs in the house, to be sufficient grounds to issue a warrant, then the Court would reduce tremendously the level of privacy and security one has in his home. The "guard dog"of the home, which has traditionally been the Fourth Amendment, would be rendered toothless. Such potential abuses make this case worthy of this Court's consideration.

II. The Alabama Court of Criminal Appeals decision to permit uncorroborated information alleging illegal conduct from informants whose credibility or reliability or basis of knowledge was not demonstrated for the magistrates consideration in finding probable cause to issue a search warrant is in direct conflict with *Gates*, *Spinelli*, and *Aguilar*.

If an informant is mentioned in the affidavit, the affidavit *must* also demonstrate the informant's veracity and basis of knowledge. *See Getz v. State*, 706 So.2d 1319, 1321(Ala. Crim. App. 1997); *Illinois v. Gates*, 462 U.S. 213, 238 (1983); *Spinelli v. United States*, 393 U.S. 410 (1969); *Aguilar v. Texas*, 378 U.S. 108 (1964).Virtually all federal circuit courts

hold the same. *See United States v. Butler*, 594 F.3d 955, 962 (8th Cir. 2010); *United States v. Quezada-Enriquez*, 567 F.3d 1228, 1233 (10th Cir. 2009); *United States v. Yusuf*, 461 F.3d 374, 385 (3rd Cir. 2006); *United States v. Koerth*, 312 F.3d 862, 866-68 (7th Cir. 2002); *United States v. Weaver*, 99 F.3d 1372, 1377 (6th Cir. 1996); *United States v. Wilhelm*, 80 F.3d 116, 119 (4th Cir. 1996); *United States v. Green*, 40 F.3d 1167, 1172 (11th Cir. 1994); *United States v. Wagner*, 989 F.2d 69, 72-73 (2d Cir. 1993); *United States v. Laws*, 808 F.2d 92, 94-95 (D.C. Cir. 1986); *United States v. Settegast*, 775 F.2d 1117, 1121 (5th Cir. 1985); *United States v. Meyer*, 536 F.2d 963, 965 (1st Cir. 1976); *United States v. Bailey*, 458 F.2d 408, 411-12 (9th Cir. 1972).

As it pertains to the first informant in the affidavit, an unidentified female, the following information was attributed to her:

> On or around April of 2004 Cpl. Ron Gibney with the Daphne police department received information from a female that Celester Edwards was selling cocaine out of his house and that he was selling ounces of cocaine for one thousand dollars a piece.

As it pertains to the second informant in the affidavit, the following was attributed to him/her.

> I have also spoken to a cooperating individual who has given drug information to the

> narcotics task force in the past which has led to arrest, who said he has bought marijuana from Celester Edwards in the past and states that Edwards sells marijuana and cocaine to several subjects out of his house, located at 407 Pine st. Daphne, al 36526. This subject stated that if someone in the Daphmont area needs powder cocaine then they go to Celester Edwards.

Neither informant's veracity or basis of knowledge could be evaluated by the judge pursuant to *Getz* or *Gates*, because absolutely no facts or contentions were presented to the judge regarding that issue. Furthermore, neither informant articulated *when* they observed or participated in the sale of drugs in or at Edwards' residence. The Court and virtually all federal circuit courts recognize that the magistrate must be told of the informant's veracity and basis of knowledge when his information is submitted in an affidavit in support of a warrant. The Court and some other federal circuit and district courts hold that failure to do so renders that information insufficient in the probable cause context. *See Aguilar v. Texas*, 378 U.S. 108 (1964) *Spinelli v. United States*, 393 U.S. 410 (1969); *Illinois* v. *Gates, 462 U.S. 213 (1983)*, *United States v. Settegast*, 755 F.2d 1117, 1122 n.5 (5thCir. 1985), *U.S. v. Elliott*, 576 F. Supp. 1579 (S.D. Ohio 1984).

The foregoing notwithstanding, the Court of Criminal Appeals acknowledged these deficiencies, yet still considered this information as part of the

"totality of the circumstances" to determine probable cause. Specifically, the Alabama Court of Criminal Appeals said:

> In this case, the appellant would have us examine separately and require individual corroboration for each specific allegation that is included in the affidavit in support of the search warrant. However, that is contrary to current law, which requires us to examine the affidavit by applying the totality-of-the-circumstances test. It is true some of the information from the female and the informant was older and did not specify dates, and it is also true that some of the corroborating information had been obtained by another officer previously. However, that older information in support of a probable cause finding was refreshed by Smith's investigation and observations of the appellant's house, garbage, and vehicle mere days before the warrant was issued. As was the case in *Vinson*, that information would have allowed the trial court to conclude that the appellant was still actively involved in the business of selling contraband or, at a minimum, that evidence about his previous business would be present at his residence at the time of the search.
>
> Based on the totality of the circumstances, we conclude that Smith set forth sufficient facts in the affidavit to allow the issuing judge to conclude that there was reasonable

> probability that contraband or evidence of a cri would be present at the appellant's residence at the time of the search. Therefore, the trial court properly denied the appellant's motion to suppress the evidence officers seized during the search. Court of Criminal Appeals Opinion P.9-10.

Because the informants in the instant matter were neither shown to be reliable or trustworthy, nor did either informant establish their basis of knowledge and when the alleged activity occurred, so as to determine whether or not their information was stale as opposed to fresh, the Court of Criminal Appeals erred when it considered the information from those informants as contributing to the totality of the circumstances establishing probable cause, in violation of the aforementioned cases of this Court and federal circuit courts.

III. This Court has not decided whether an unspecified amount of drug residue recovered from a trash bag, without further police corroboration, is sufficient to support a determination that the continued presence of the drugs in the residence to be searched was probable, and the lower courts are divided on this issue.

The lower courts have reached conflicting conclusions as to whether a magistrate could find probable cause to issue a search warrant based upon an affidavit that is ambiguous in reference to the amount or nature of drug residue recovered from a trash pull, and that fails to establish any surveillance or other independent police corroboration, or relies heavily upon a conclusory tip without providing factual support of the reliability of the tip.

A. Split in the Federal Circuits

In *United States v. Elliot*, 576 F. Supp. 1579 (S.D. Ohio 1984), The United States District Court was confronted with such a factual scenario, ultimately finding that "the discovery of discarded contraband, standing alone, is insufficient to support a determination of probable cause." *Id.* at 1581. First, the *Elliot* court removed the uncorroborated allegations of the informant whose reliability and veracity had not been demonstrated to the magistrate which was offered in support of the search warrant from the totality of circumstances test, as established in *Illinois v. Gates*, 462 U.S. 213

(1983). Although the *Elliot* court recognized *Aguilar*, *Spinelli*, and *Gates* should be applied to cases involving anonymous complaints, it found that "the instant case [presented] serious questions as to the timeliness of both the anonymous complaints as well as the affiant's surveillance." *Elliot*, 576 F. Supp. at 1580. Because the affidavit in *Elliot* lacked any indication of when the complaints were received, the court concluded that those complaints alone could not form a basis for probable cause, and *Aguilar*, *Spinelli*, and *Gates* were not implicated. *Id.* The court further found:

> The affiant has neglected to include averments as to the date (s) of the anonymous complaints and the date(s) of his surveillance . . . . [W]e can only conclude that, due to the absence of these dates, the anonymous complaints and the affiant's surveillance cannot contribute to a basis for determining the existence of probable cause. To conclude otherwise would be to condone an error so fraught with the potential for abuse as to seriously undermine the constitutional protections afforded by the Fourth Amendment. *Id.*

The *Elliot* court further noted that only the residue discovered in defendant's garbage remained in support of the warrant, and that an unspecified amount of marijuana cigarettes and stems was insufficient to support a determination of probable cause. *Id.* ("[T]he evidence in the garbage did not

render the continued presence of marijuana probable.").

Furthermore, *Elliot* held that the presence of such residue did not indicate a large quantity of marijuana in the house, only that some marijuana had left the home at some point. *Id.* (noting that the waste of previous marijuana use indicates that its presence is no longer in the home, and without further corroboration, this assumption is more appropriate in the discussion of mere possibilities than it is in the discussion of probabilities); *see also Settegast*, 775 F.2d at 112 n.5 (citing United States v. Kolidiej, 712 F.2d 975,977 (5th Cir. 1983))(Finding the tips furnished "nothing more than a conclusion that the defendant [s] had engaged in criminal conduct".); They wholly lack evidence either of the basis of the informant's knowledge or of the reliability of the informants, therefore, fall far short of the basis required by *Gates*. The tips must, therefore, be excised from the warrant, and the remaining allegations must stand alone to support the probable cause determination. *Id.)*

In *United States v. Cunningham*, 145 F.Supp. 2d 964 (E.D. Wis. 2001), the Wisconsin Eastern District Court rejected the contention that a "trash pull" resulting in the recovery of cocaine residue established probable cause. *Id.* at 969 (finding that the affidavit itself was insufficient to establish probable cause, but denying motion to suppress pursuant to the good faith exception). The court reasoned:

> [e]xcept for the statement about cocaine traces in the garbage, the information in [affiant's]

> affidavit is extremely thin. It consists only of conclusory statements provided by informants not shown to be reliable or conclusory statements by [affiant] which are devoid of factual support. As previously stated, a series of conclusory statements does not add up to probable cause. Therefore, I disagree with the magistrate judge's recommendation that the affidavit established probable cause and decline to adopt it.
> *Id.* at 968.

The 8th Circuit, however, reached an alternate conclusion. *See United States v. Smith*, 581 F.3d 692, 694 (8th Cir. 2009) (finding that an affidavit referencing a tip from a reliable informant, a prior drug conviction, and a recent search of trash at defendant's residence that yielded evidence of multiple baggies with cocaine and marijuana residue established probable cause to issue a search warrant of the defendant's residence for evidence of illegal drug activity); *United States v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003) ("The question in this case is whether the marijuana seeds and stems in Briscoe's garbage were sufficient *stand-alone* evidence to establish probable cause. We hold that they were."); *United States v. Wendelsdorf*, 2005 WL 1398476, at *6 (N.D. Iowa June 9, 2005) ("Probable cause to support the warrant in the present case was doubtful, at best. However, applying the deferential standard set forth in *Gates*, and the preference for resolving doubtful or marginal cases in favor of upholding warrants, the court finds the warrant application was legally sufficient . . . ."); *but see*

United States v. Koons, 300 F.3d 985, 994-95 (8th Cir. 2002) (Heaney, J., dissenting) (finding that marijuana stems did not provide information sufficient to conclude evidence of drug dealing in the defendant's residence, and the unreliable tip, as presented in the affidavit, was not entitled to any weight in a probable cause analysis).

B. A split among state courts

While lower federal courts are split on the issue, the diverse and divided state courts further convolute the analysis. Multiple courts apply *Gates*, but there is division as to whether uncorroborated and unreliable evidence should enter a totality of circumstances analysis. Some courts have held that unreliable and vague informant information should be omitted from magistrate evaluation, allowing only the residue from the "trash pull" to be considered. *State v. Weimer*, 2009 WL 3043979, at *7 (Ohio Ct. App. Sept. 24, 2009); *Serrano v. State*, 123 S.W.3d 53 (Tex. App. 2003). In *Weimer*, the court found that while the informant information supplied in an affidavit is generally considered with other available information, the "material omissions left out of the affidavit, together with its scant facts, render portions of the affidavit itself not constitutionally reliable." *Weimer*, 2009 WL 3043979, at *7. The court then determined that only the evidence from the trash pull should stand, and "[t]he discovery of this contraband, standing alone, is therefore insufficient to support a determination of probable cause." *Id.*

The Texas appeals court in *Serrano* found that an affidavit that "did not reflect when the affiant-officer received the tip from the informant . . . . failed to reveal when the informant obtained his information . . . . [and] failed to show when the incident described in the affidavit (dealing in cocaine) took place." *Serrano*, 123 S.W.3d at 60. The deficiencies in the tip precluded it from contributing to the basis for determining probable cause under a *Gates* totality of circumstances test. *See id.* at 60-63 ("The conclusory tip with no shown basis of knowledge and its temporal difficulties, plus its lack of nexus to the residence, does not in fact contribute to the finding of probable cause."). It was further determined that the cocaine residue from the trash, standing alone, did not justify a finding of probable cause to search the residence. *Id.* at 63. Because the garbage on the curb was susceptible to public access and "unwelcome meddlers," and the residence was located in an area frequented by known drug users and constant flow of traffic, the trash pull alone could not establish a nexus between the cocaine residue found in the garbage and residence to be searched. *Id.*; *but see Gonzales v. State*, 2008 WL 2580061, at * 3 (Tex. App. July 1, 2008) ("[W]e find *Serrano* to be distinguishable . . . . [A]lthough the case involves the search of trash left at a curb, the officers actually saw appellant place the trash at the curb the same day the trash was searched and while the residence was under constant surveillance). Overturning the trial court's denial of defendant's motion to dismiss, the court held that despite the great deference given to a magistrate's issuance of a warrant, under the *Gates* totality of circumstances

test, there was no substantial basis for determining that probable cause existed. *Serrano*, 123 S.W.3d at 63 (citing *Illinois v. Gates*, 462 U.S. 213, 238-39 (1983)).

Even in cases where contraband was discovered in three separate trash pulls on three consecutive days, without an eyewitness account of the dumping of trash, one court has found that this does not amount to probable cause in establishing a nexus between the contraband located in the "trash pulls" and the residence to be searched. *People v. Burmeister*, 728 N.E.2d 1260, 1265-266 (Ill. App. Ct. 2000). The Illinois Appellate Court reasoned that there is no privacy interest in curbside trash, and since trash is readily accessible to "children, scavengers, and snoops," police may not presume that evidence discovered in curbside trash originated from the nearest residence. *Id.* at 1264-265 (citing *California v. Greenwood*, 486 U.S. 35, 37-38 (1998); *People v. Eyler*, 549 N.E.2d 268 (Ill. 1989)).

In *Cruz v. State*, 788 So. 2d 375 (Fla. Dist. Ct. App. 2001), the Florida District Court of Appeals reviewed the sufficiency of an affidavit consisting of an anonymous tip alleging illegal drug activity, two "trash pulls" conducted seven and a half months later that resulted in recovery of two marijuana cigarettes, mail with defendants' names in the same trash that contained the marijuana residue, surveillance confirming defendants resided at the home, and records of previous drug arrests of defendants. *Id.* at 376. The *Cruz* court found that while the affidavit did sufficiently establish that residual amounts of marijuana were recovered in two separate trash pulls, it lacked "other sufficient

facts to indicate a fair probability that cannabis would be found in appellant's home or to show a pattern of continuous drug activity. The evidence neither supports the conclusion that this was a continuous 13 month investigation nor does it establish a continuing pattern of criminal activity." *Id.* at 378; *see also Raulerson v. State*, 714 So. 2d 536, 537 (Fla. Dist. Ct. App. 1998) (reversing denial of motion to suppress because affidavit lacked sufficient facts to indicate the probability of marijuana in the home, despite the recovery of marijuana cigarettes, seeds, stems, and pieces of cannabis in conjunction with an anonymous tip); *Gesell v. State*, 751 So. 2d 104, 105 (Fla. Dist. Ct. App. 1999) (holding that a "trash pull" resulting in the recovery of a two-gallon zip lock baggie containing one-tenth of a gram of marijuana did not sufficiently corroborate an anonymous tip that drugs were being sold in the home, and therefore found the "trash pull" standing alone or in conjunction with the information provided in the affidavit was not sufficient to indicate a fair probability that drugs were inside the home). Therefore, the *Cruz* court held that the residue recovered in the two "trash pulls," standing alone, did not provided sufficient evidence for a magistrate to find continued presence of an illegal substance in the home probable. *Cruz*, 788 So. 2d at 378. The *Cruz* court also found that the "trash pulls" were too remote in time from the initial complaint and surveillance to corroborate that initial tip. *Id.* (identifying the seven month period between the initial anonymous tip, and the six month periods between the fruitful "trash pulls" as stale in the context of ongoing illegal drug activity). In weighing

probable cause, the court reasoned that "staleness is a very important factor in this case and weighs heavily against a finding of probable cause." *Id.*

Other courts have held that even if unreliable and uncorroborated informant information is considered in a totality of circumstances test, a single "trash pull," without further surveillance, is insufficient to establish probable cause that illegal drug activity is ongoing within the residence. *State v. Kelly*, 2009 WL 545996, at * 3 (Ohio Ct. App. Mar. 5, 2009) (finding that numerous citizen complaints alleging drug activity and a trash pull resulting in an unspecified amount of marijuana residue did not amount to probable cause under the *Gates* totality of circumstances test).

While some state courts have held that anonymous tips and unreliable statements, coupled with evidence recovered from "trash pulls" lack sufficient probable cause for a magistrate to believe that there is ongoing illegal drug activity in the place to be searched, other state courts have reached an opposite conclusion. *See State v. Bordner*, 53 S.W.3d 179 (Mo. Ct. App. 2001); *State v. Erikson*, 496 N.W.2d 555 (N.D. 1993). The North Dakota Supreme Court found that an affidavit based upon "ongoing investigation," coupled with the recovery of marijuana residue and a citation with suspects name, gathered from a dumpster "trash pull," supported a determination of probable cause. *Erikson*, 496 N.W.2d at 559 ("[A] doubtful or marginal case should be resolved in favor of the magistrate's determination of probable cause."); *but see People v. Burmeister*, 728 N.E.2d 1260, 1266 (Ill.

App. Ct. 2000) (declining to adopt the holding and reasoning in *Erikson*).

In *Bordner*, the affidavit asserted that police had received two very detailed anonymous tips, including specific types of illegal weapons possessed by the suspect, location of marijuana plants suspect was growing, and a recent explosion triggered by defendant while cooking a batch of methamphetamine. *Bordner*, 53 S.W.3d at 180-81. Following a "trash pull," police discovered a multitude of evidence indicative of methamphetamine development, including several empty cans of acetone, charcoal fluid, Red Devil Lye, and "Heet," several empty bottles of psuedoephedrine pills, coffee filters with red phosphorous, numerous used syringes, empty packages of dry ice, glass Mason jars with white residue, disposable gloves, rubber tubing, duct tape, glass pipes with residue, and a large amount of a white binder substance. *Id.* The court found that under a totality of circumstances, as announced in *Gates*, the circuit court had a sufficient basis for finding probable cause for the search. *Id.* at 182 ("The trash bags' contents included containers for common products for making methamphetamine and corroborated reports to police that Bordner had been making methamphetamine in his house. The trash bags 'updated' the aged reports.")

IV. The present state of the law is unsettled, inconsistent, and divergent regarding the sufficiency of evidence obtained pursuant to trash pulls.

Although the facts in petitioner's case drastically differ from the very specific tips in cases such as *Bordner*, and the amount and quality of evidence obtained from the "trash pull" is significantly less indicative of ongoing criminal activity, these cases illustrate the plurality of divergent state and federal court opinions arising from the issue of probable cause in relation to "trash pulls." While some courts hold that evidence garnered from "trash pulls," standing alone, generates a sufficient basis for a magistrate to find probable cause in issuing a search warrant, others hold that it does not. *Compare United States v. Briscoe*, 317 F.3d 906, 908 (8th Cir. 2003) (holding marijuana residue recovered in a "trash pull," standing alone, is sufficient to establish probable cause) *with United States v. Elliot*, 576 F.Supp. 1579, 1580 (S.D. Ohio 1984) (holding that unspecified amount of marijuana cigarettes and stems were insufficient to support a determination of probable cause).

Furthermore, several courts find that when the reliability of an informant's information or anonymous tip has not been specified, and police have relied on merely conclusory evidence, such information does not enter into a *Gates* totality of circumstances analysis. *Elliot*, 576 F. Supp. at 1580; *State v. Weimer*, 2009 WL 3043979, at *7 (Ohio Ct. App. Sept. 24, 2009); *Serrano v. State*, 123 S.W.3d

53, 60 (Tex. App. 2003); *contra State v. Erikson*, 496 N.W.2d 555 (N.D. 1993). It has also been held that even under a totality of circumstances test, residue from a trash pull, coupled with informant information or anonymous tips, without surveillance connecting the evidence in the "trash pull" to the residence to be seized, lacks any substantial basis for a magistrate to find probable cause. *See generally People v. Burmeister*, 728 N.E.2d 1260 (Ill. App. Ct. 2000); *State v. Kelly*, 2009 WL 545996, at * 3 (Ohio Ct. App. Mar. 5, 2009). Finally, it has been held that even if a finding of probable cause in an affidavit was doubtful at best, the deferential standard set forth in *Gates,* which gives preference for resolving doubtful or marginal cases in favor of upholding warrants, should be applied. *United States v. Wendelsdorf*, 2005 WL 1398476, at *6 (N.D. Iowa June 9, 2005).

While these cases are not binding on Alabama courts, they offer guidance in reference to this particular issue of first impression. The Alabama Court of Criminal Appeals erred when it considered information from informants who were shown to be neither reliable nor trustworthy, and who could not establish a basis of knowledge for the criminal acts they alleged or the time frame which the acts occurred. The Alabama further erred when it considered an unknown amount of drug residue, standing alone, indicative of its continued presence inside a residence.

Because the courts are so divergent, conflicted, and ambiguous relating to the application of evidence obtained in "trash pulls," especially in the context of *Gates*, the Court should clarify the

proper standard to apply. While *Gates* has established a constitutional floor, it is imperative that the Court clarify whether evidence gathered from "trash pulls," standing alone or with uncorroborated and unreliable information, resides below that floor.

V. The Alabama Court of Criminal Appeals application of the Good Faith Exception in the affidavit in support of the warrant misapprehends this Court's holding in *United States v. Leon*, 468 U.S. 897 (1984).

The Alabama Court of Criminal Appeals came to its decision that the information contained in the affidavit in support of the warrant gave the magistrate sufficient information to find probable cause. And, if it did not, then the Good Faith exception, as crafted in *Leon,* was applicable. The Alabama Court of Criminal Appeals stated:

> Moreover, "[e]vidence obtained by officers acting in objectively reasonable reliance on a warrant issued by a neutral and detached magistrate need not be excluded, even if the warrant is ultimately found to be invalid. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)." *Tolbert v. State*, 718 So. 2d 731, 734 (Ala. Crim. App. 19 97).
>
> "In Leon, the United States Supreme Court recognized four circumstances in which the good-faith exception was inapplicable: (1)

when the magistrate or judge relies on information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) when the magistrate wholly abandons his judicial role and fails to act in a neutral and detached manner; (3) when the warrant is based on an affidavit so lacking [in] indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid." *Straughn v. State*, 876 So. 2d 492, 500 (Ala. Crim. App. 2003).

The record does not indicate that the affidavit contained false information or that the issuing judge did not act in a neutral and detached manner. Also, the affidavit was not so lacking in indicia of probable cause and the warrant was not so facially deficient that officers could not have reasonably relied upon it. Because the officers relied upon the search warrant in good faith, the evidence they seized pursuant to that warrant was admissible even if the search warrant was not valid.

For these reasons, the trial court properly denied the appellant's motion to suppress. Accordingly, we affirm the trial court's judgment.

Because the affidavit in support of the warrant in this matter made general allegations of criminal activity against Edwards and failed to articulate the informants' veracity, credibility, or basis of knowledge, it was in effect a bare-bones affidavit.

Because the affidavit was facially deficient and lacking in any indicia of probable cause it was not entitled to the Good Faith exception as pronounced in *Leon*. Even if the affidavit was accompanied by more information, the Court, notwithstanding the deference given to magistrates probable cause findings, could- pursuant to *Leon*- still find the warrant invalid because the magistrate's decision reflects an improper analysis of the 'totality of the circumstances'. *Leon*, 468 U.S. at 915. The Court should issue a *writ of certiorari* to the Alabama Court of Criminal Appeals to clarify the proper analysis of the Good Faith exception under the totality of the circumstances.

CONCLUSION

There is significant variation in the application of the "totality of circumstances" evaluation of probable cause, as established by this Court in *Illinois v. Gates*, 462 U.S. 213 (1983), in state courts and federal circuits, specifically pertaining to the recovery of illegal drug residue from police initiated "trash pulls." The petitioner prays that the Court clarify the sufficiency of an officer's affidavit, as applied to a magistrate's determination of probable cause necessary for the issuance of a search warrant of a defendant's residence, when the affidavit contains uncorroborated assertions of illegal conduct over an unknown period of time made by informants whose reliability and or credibility is not established, nor their basis of knowledge of their allegations of criminal conduct, mentions an unspecified amount of narcotic residue obtained through a police initiated "trash pull," and fails to establish any surveillance connecting the evidence garnered from the trash to the residence of intended search. Stated differently, whether a judge had a substantial basis for concluding it probable that narcotics would be contained in a home, based upon an unspecified amount of drug residue obtained from trash open to the public and lacking any exclusivity from scavengers, intermeddlers, or other possible intervening factors, without establishing a nexus between the owner of a residence and the evidence found in the trash. While this evidence would be factored into a totality of circumstances test, several courts hold that such evidence, standing alone, is

sufficient to issue probable cause. It is pertinent that the Court illuminate the sufficiency of such evidence and its bearing on probable cause. As this Court stated in *Aguilar*, the magistrate must "perform his 'neutral and detached' function and not serve merely as a rubber stamp for police."

DATED: September, 16, 2010.

Respectfully submitted by,

JOE M. REED*
524 S. UNION STREET
MONTGOMERY, AL
36104
(334) 834-2000
(334) 834-2088 FAX
joemreed@bellsouth.net

*Counsel for Petitioner

Court of Criminal Appeals
State of Alabama
Judicial Building, 300 Dexter Avenue
P. O. Box 301555
Montgomery, AL 36130-1555

MEMORANDUM
CR-08-1557

Celester Cedric Edwards v. State of Alabama,

WISE, Presiding Judge.
The appellant was convicted of trafficking in cocaine, a violation of ALA. CODE § 13A-12-231(2) (1975); second-degree unlawful possession of marijuana, a violation of ALA. CODE § 13A-12-214 (1975); and tampering with physical evidence, a violation of ALA. CODE § 13A-10-129(a)(1) (1975). The trial court sentenced him, as a habitual offender, to serve a term of life in prison on the trafficking conviction. *See* ALA. CODE § 13A-5-9(c)(3) (1975). It also sentenced him to serve terms of one year in jail on the possession conviction and ninety days in jail on the tampering conviction. Finally, it imposed a $50,000 fine pursuant to ALA. CODE § 13A-12-231(2)(a) (1975), and a $2,000 Demand Reduction Assessment Act fine pursuant to ALA. CODE § 13A-12-281 (1975). The appellant filed a motion for a new trial, which was overruled by operation of law. *See* Ala. R. Crim. P. 24.4. This appeal followed. The State presented evidence that, on November 19, 2004, law enforcement officers executed a search warrant at the appellant's residence. During the

search, they recovered cocaine and marijuana, among other things. The appellant argues that the trial court erred in denying his motion to suppress evidence officers obtained during the allegedly illegal search. Specifically, he contends that the affidavit in support of the search warrant was not sufficient to establish probable cause to believe that contraband would be found in his home on the day the warrant was issued.

In the affidavit in support of the issuance of the search warrant, Investigator David W. Smith of the Daphne Police Department stated as follows:

> "My name is David w. Smith. I have been a police officer with the Daphne police department since March 2001. I have completed my minimum standards training at the Southwest Alabama police academy and have attended several narcotics training seminar/classes since. As a police officer I have made several felony and misdemeanor drug arrest and have testified in both municipal and circuit court, resulting in the conviction of those arrested. I have been assigned to the Baldwin County Narcotics Task Force since November of 2004. "On or around April of 2004 Cpl. Ron Gibney with the Daphne police department received information from a female that Celester Edwards was selling cocaine out of his house and that he was selling ounces of cocaine for one thousand dollars apiece. Intel was gathered on Celester Cedric Edwards showing an Extensive history of drug arrest to include

several possession of marijuana 1st charges. I have also spoken to a cooperating individual who has given drug information to the narcotics task force in the past which has led to arrest, who said he has bought Marijuana from Celester Edwards in the past and states that Edwards sells marijuana and cocaine to several subjects out of his house, located at 407 Pine St. Daphne, AL 36526. This subject stated that if someone in the Daphmont area needs powder cocaine then they go to Celester Edwards. "On November 16, 2004 I viewed garbage in front of 407 Pine St. Which was later taken control of in Front of the residence believed to be that of Celester Edwards. This was in reference to a trash pull that was performed by investigator Ceonia Stanton on 10/22/2004 on this same residence being 407 Pine St. Daphne, AL. In that trash pull Investigator Stanton recovered marijuana residue and baggies with cocaine residue in the trash along with U.S. mail addressed to 407 Pine St. and having Celester Edwards name on it. At the time of that trash pull investigator Stanton was a member of the Baldwin County Narcotics Task Force. The garbage I had pulled on 11/16/2004 had been placed along the roadway for pick-up and was picked up by a solid waste supervisor with the city of Daphne in front of 407 Pine St. Daphne, AL. This supervisor then met me at the fire station in Daphne where control of the trash was handed over to myself for examination. While searching this garbage I

found marijuana and marijuana residue (seeds and stems) which field tested positive for marijuana. In this garbage was also found several plastic baggies with a white Powder residue which field tested positive for cocaine. In this garbage was also found U.S. mail Addressed to 407 pine St. Daphne, AL 36526. Two Vehicles that are registered to Celester Edwards have been viewed by myself as being present at this residence on a frequent basis. Also Celester Edward's driver's license shows his address as being 407 pine St. Daphne, AL 36526. "Based on my training and experience I know the Following:

"A: Drug dealers often keep the bulk of their supply at their residence to avoid the risk of seizure by transporting the bulk of their supply with them.

"B. Drug dealers often keep records of the drug transaction to include but not limited to name, tally sheets and phone numbers in their residence.

"C. Drug paraphernalia is often kept at in a drug dealers residence that is related to the use and sale of illegal drugs to include scales, baggies, pipes and cutting agents.

"D. Drug dealers operate a cash business therefore currency is often found in their residences that is proceeds of the sale of illegal drugs.

"E. Drug dealers often conceal drugs and/or currency outside of their residence in vehicles and/or buildings to keep from being found.

"F. Drug dealers often keep photos and/or

videos of themselves with quantities of illegal drugs.
"Based on the above stated facts, I have reason to believe that at the residence of Celester Edwards, there is marijuana, cocaine, paraphernalia, documents, notes, currency, scales, packaging materials, photos, videos and other articles believed to be used in the unlawful possession or distribution of controlled substance and/or marijuana."

The appellant asserts that "[t]here was not enough information in the affidavit presented to the judge to conclude that the female and cooperating individual were reliable in their assertion that [he] sold cocaine from his house." He also asserts that "[t]he Daphne Police failed to corroborate through independent police investigation that Edwards' home contained drugs." Finally, he asserts that "[t]he finding of contraband and mail addressed to [him] in the trash, which was also accessible to the general public on October 22, 2004 and November 16, 2004, did not indicate its continued presence in [his] home at the time the warrant issued on November 19, 2004." "When determining probable cause, '[a]n issuing judge's determination that sufficient probable cause existed to support the warrant is "entitled to great deference and is conclusive in the absence of arbitrariness," *Wamble v. State*, 593 So. 2d 109, 110 (Ala. Cr. App. 1991), quoting *United States v. Pike*, 523 F.2d 734 (5th Cir. 1975), *cert. denied*, 426 U.S. 906, 96 S. Ct. 2226, 48 L. Ed. 2d 830 (1976), and a reviewing court need determine only that a magistrate or judge had a 'substantial

basis' for concluding that probable cause existed. *Illinois v. Gates*, 462 U.S. 213, 238-39, 103 S. Ct. 2317, 2332, 76 L. Ed. 2d 527 (1983); *Sullivan v. State*, 651 So. 2d 1138 (Ala. Cr. App. 1994); *McCray v. State*, 501 So. 2d 532 (Ala. Cr. App. 1986). This court has previously stated: "[t]he present test for determining whether an informant's tip establishes probable cause is the flexible totality-of- the-circumstances test of *Illinois v. Gates*, [462 U.S. 213, 103 S. Ct. 2317, 76 L. Ed. 2d 527 (1983)]. The two prongs of the test of *Aguilar v. Texas*, 378 U.S. 108, 84 S. Ct. 1509, 12 L. Ed. 2d 723 (1964), and *Spinelli v. United States*, 393 U.S. 410, 89 S. Ct. 584, 21 L. Ed. 2d 637 (1969), involving informant's veracity or reliability and his basis of knowledge, "are better understood as relevant considerations in the totality of circumstances analysis that traditionally has guided probable cause determinations: a deficiency in one may be compensated for, in determining the overall reliability of a tip, by a strong showing as to the other, or by some other indicia of reliability." *Gates*, [462 U.S. at 223,] 103 S. Ct. at 2329. Probable cause involves "a practical, common sense decision whether, given all the circumstances, ... including the 'veracity' and 'basis of knowledge' of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place." *Gates*, [462 U.S. at 238,] 103 S. Ct. at 2332.' "*Pugh v. State*, 493 So. 2d 388, 392 (Ala. Cr. App. 1985), *aff'd*, 493 So. 2d 393 (Ala. 1986). "'Reference to a confidential informant's "track record" of past performances is a viable means of determining his credibility.' *Reese v. State*, 456 So. 2d 341, 349 (Ala. Cr. App. 1982), *cert. denied*,

464 U.S. 838, 104 S. Ct. 127, 78 L. Ed. 2d 124 (1983). *See also Moynes v. State*, 568 So. 2d 392, 393 (Ala. Cr. App. 1990); *Carter v. State*, 435 So. 2d 137, 139 (Ala. Cr. App. 1982).... In addition, corroboration supplied by the personal observations of the police officers lends support to the reliability and veracity of the informant. *See Moynes*, 568 So. 2d 392; *Dale v. State*, 466 So. 2d 196 (Ala. Cr. App. 1985)." *Money v. State*, 717 So. 2d 38, 42-43 (Ala. Crim. App. 1997). Additionally, the State is not required to show that the informant has proven to be reliable any particular number of times. *See Reese v. State*, 456 So. 2d 341 (Ala. Crim. App. 1982). "The fact that a confidential informant has not supplied information numerous times does not mean that the informant is not reliable. *Kirk*, 612 So. 2d at 1254. Common sense dictates that a confidential informant 'must be a first time informer before [the informant] can inform a second time.' 612 So. 2d at 1254." *Usery v. State*, 668 So. 2d 919, 921 (Ala. Crim. App. 1995). "[T]he facts supporting the warrant must show probable cause to believe that the criminal objects are presently in the place to be searched, *Durham v. United States*, 403 F.2d 190, 193 (9th Cir. 1968), and "it cannot follow in all cases, simply from the existence of probable cause to believe a suspect guilty, that there is also probable cause to search his residence." *United States v. Lucarz*, 430 F.2d 1051, 1055 (9th Cir. 1970). "'But it is also clear that interpreting a search warrant in the proper "commonsense and realistic fashion," *United States v. Ventresca*, supra, 380 U.S. [102] at 108, 85 S. Ct. 741, [745, 13 L. Ed. 2d 684] may result in the inference of probable cause to believe that

criminal objects are located in a particular place to which they have not been tied by direct evidence.' *United States v. Velenzuela*, 596 F.2d 824, 828 (9th Cir.), *cert. denied sub nom. Lizarraga v. United States*, 441 U.S. 965, 99 S. Ct. 2415, 60 L. Ed. 2d 1071 (1979). "... '[T]he nexus between the objects to be seized and the premises searched can be established from the particular circumstances involved and need not rest on direct observation.' *United States v. Lockett*, 674 F.2d 843, 846 (11th Cir. 1982). "'Controlled substances are of considerable value on the street, much sought after by users, and, unless kept in a safe place, subject to theft. Wide experience over the years has demonstrated that such items are usually kept in a dealer's place of residence and under constant surveillance or supervision. The defendant was obviously a dealer. He had "pounds" of marijuana. Such a quantity would not be carried on his person or left unprotected in an automobile. Where then does logic and common sense dictate that it would be kept? There is only one answer, his residence.' *State v. Bernth*, 196 Neb. 813, 246 N.W.2d 600, 602 (1976), *cert. denied*, 430 U.S. 948 [97 S. Ct. 1587, 51 L. Ed. 2d 797] (1977)."*See W. LaFave*, 1 Search And Seizure §3.7(d) (1978). "In assessing the adequacy of a search warrant affidavit, '[t]he focus of judicial inquiry should not be upon a "grading of the paper" of the affiant, but rather, should be based upon whether the constitutional rights of the party subject to the search will be violated if the warrant is issued.' *United States v. Sorrells*, 714 F.2d 1522, 1528 (11th Cir. 1983)." *Gord v. State*, 475 So. 2d 900, 905 (Ala. Crim. App. 1985).

Finally, "[w]hether the circumstances recited in an affidavit offered in support of an application for a search warrant are such that the probable cause that might once have been demonstrated by them has grown 'stale' is a matter that 'must be determined by the circumstances of each case.' *Sgro v. United States*, 287 U.S. 206, 53 S. Ct. 138, 77 L. Ed. 260 (1932). "'Where the affidavit recites a mere isolated violation it would not be unreasonable to imply that probable cause dwindles rather quickly with the passage of time. However, where the affidavit properly recites facts indicating activity of a protracted and continuous nature, a course of conduct, the passage of time becomes less significant.' *United States v. Johnson*, 461 F.2d 285, 287 (10th Cir. 1972). "'The "basic criterion as to the duration of probable cause [or staleness] is the inherent nature of the crime."' *United States v. Magluta*, 198 F.3d 1265, 1271 (11th Cir. 1999) (quoting *United States v. Bascaro*, 742 F.2d 1335, 1345 (11th Cir. 1984)). In *Moore v. State*, 416 So. 2d 770 (Ala. Crim. App. 1982), Alabama recognized that a determination of 'staleness' must turn on the circumstances of each case. In *Moore*, the Court of Criminal Appeals concluded that the information in an affidavit supporting a search warrant was not so stale as to negate a finding of probable cause, even though some of the information in the affidavit concerning the allegedly stolen items sought by the warrant was approximately two months old at the time the warrant was executed. The court in *Moore* considered staleness in terms of whether the affidavit information was 'fresh' or 'remote,' and stated: "What is "fresh" and how is it distinguished

from "remote?" We do not perceive of any magical formula by which a precise computation of the time period may be made. Rather, the underlying circumstancesincluding such matters as the basis of the informant's knowledge, the ease or difficulty in moving the items since they were last observed, the use or probable use to which the items are put, and the mobile nature or degree of permanence of the place of concealment -- must be examined by a neutral and detached magistrate to reach a determination as to the probability of whether the proof speaks as of the time of the issuance of the search warrant.' 416 So. 2d at 772. See also *Nelms v. State*, 568 So. 2d 384 (Ala. Crim. App. 1990)." *Vinson v. State*, 843 So. 2d 229, 233 (Ala. 2001). In this case, the appellant would have us examine separately and require individual corroboration for each specific allegation that is included in the affidavit in support of the search warrant. However, that is contrary to current law, which requires us to examine the affidavit by applying the totality-of-thecircumstances test. It is true some of the information from the female and the informant was older and did not specify dates, and it is also true that some of the corroborating information had been obtained by another officer previously. However, that older information in support of a probable cause finding was refreshed by Smith's investigation and observations of the appellant's house, garbage, and vehicle mere days before the warrant was issued. As was the case in Vinson, that information would have allowed a crime the trial court to conclude that the appellant was still actively involved in the business of selling contraband or, at a minimum, that

evidence about his previous business would be present at his residence at the time of the search. Based on the totality of the circumstances, we conclude that Smith set forth sufficient facts in the affidavit to allow the issuing judge to conclude that there was reasonable probability that contraband or evidence of a crime would be present at the appellant's residence at the time of the search. Therefore, the trial court properly denied the appellant's motion to suppress the evidence officers seized during the search. Moreover, "[e]vidence obtained by officers acting in objectively reasonable reliance on a warrant issued by a neutral and detached magistrate need not be excluded, even if the warrant is ultimately found to be invalid. *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984)." *Tolbert v. State*, 718 So. 2d 731, 734 (Ala. Crim. App. 1997). "In *Leon*, the United States Supreme Court recognized four circumstances in which the good-faith exception was inapplicable: (1) when the magistrate or judge relies on information in an affidavit that the affiant knew was false or would have known was false except for his reckless disregard of the truth; (2) when the magistrate wholly abandons his judicial role and fails to act in a neutral and detached manner; (3) when the warrant is based on an affidavit so lacking [in] indicia of probable cause as to render official belief in its existence entirely unreasonable; and (4) when the warrant is so facially deficient that the executing officer cannot reasonably presume it to be valid." *Straughn v. State*, 876 So. 2d 492, 500 (Ala. Crim. App. 2003). The record does not indicate

that the affidavit contained false information or that the issuing judge did not act in a neutral and detached manner. Also, the affidavit was not so lacking in indicia of probable cause and the warrant was not so facially deficient that officers could not have reasonably relied upon it. Because the officers relied upon the search warrant in good faith, the evidence they seized pursuant to that warrant was admissible even if the search warrant was not valid. For these reasons, the trial court properly denied the appellant's motion to suppress. Accordingly, we affirm the trial court's judgment.
AFFIRMED.
Welch, Windom, Kellum, and Main, JJ., concur.

COURT OF CRIMINAL APPEALS
STATE OF ALABAMA

'Graphic Omitted'

CR-08-1557
Celester Cedric Edwards v. State of Alabama
(Appeal from Baldwin Circuit Court: CC06-106)

NOTICE

You are hereby notified that on April 2, 2010 the following action was taken in the above referenced cause by the Court of Criminal Appeals:

Application for Rehearing Overruled.

'Graphic Omitted'

Lane W. Mann,
Clerk
Court of Criminal Appeals

cc: Hon. Robert Earl Wilters, Circuit Judge
Hon. Jody Campbell, Circuit Clerk
Darryl Avon Parker, Attorney
Joe M. Reed, Attorney
Andy Scott Poole, Asst. Atty. Gen.

IN THE SUPREME COURT OF ALABAMA

'Graphic Omitted'

June 18, 2010

1090999

Ex parte Celester Cedric Edwards. PETITION FOR WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS (In re: Celester Cedric Edwards v. State of Alabama) (Baldwin Circuit Court: CC06-106; Criminal Appeals : CR-08-1557).

CERTIFICATE OF JUDGMENT

WHEREAS, the petition for writ of certiorari in the above referenced cause has been duly submitted and considered by the Supreme Court of Alabama and the judgment indicated below was entered in this cause on June 18, 2010:

Writ Denied. No Opinion. Smith, J. - Cobb, C.J., and Woodall, Parker, and Shaw, JJ., concur.

NOW, THEREFORE, pursuant to Rule 41, Ala. R. App. P., IT IS HEREBY ORDERED that this Court's judgment in this cause is certified on this date. IT IS FURTHER ORDERED that, unless otherwise ordered by this Court or agreed upon by the parties, the costs of this
cause are hereby taxed as provided by Rule 35, Ala. R. App. P.

I, Robert G. Esdale, Sr., as Clerk of the Supreme Court of Alabama, do hereby certify that the foregoing is a full, true, and correct copy of the instrument(s) herewith set out as same appear(s) of

record in said Court.

Witness my hand this 18th day of June, 2010.

'Graphic Omitted'
Clerk, Supreme Court of Alabama